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No. 85-482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

THELMA COUSINEAU, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARK COUSINEAU,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Association of Manufacturers (NAM) hereby respectfully moves for leave to file a brief as *amicus curiae* in this case. The brief *amicus curiae* accompanies this motion. This motion is made necessary because we have been unable to obtain the consent of the Respondent, Thelma Cousineau, to the filing of this brief. The consent of all other parties to this litigation has been obtained.

The NAM and its over 13,000 member companies are active participants in the federal regulatory and political processes. As such, the NAM and its members often testify and/or file comments on proposed legislation and regulations, and frequently urge a federal department or agency to take, or refrain from taking, some specific action. The NAM and its members often join *ad hoc* coalitions of private sector entities that suggest that agencies of the federal government respond to specific problems. We are even now engaged in an effort regarding workplace hazardous substances notification.

These and other related activities have led to our concern and interest in the case at bar. We believe that the decision of the Michigan Court of Appeals will have the effect of penalizing citizens for the exercise of their First Amendment right of petitioning the government—an activity which constitutes a major part of the NAM's efforts on behalf of American industry. The court's finding that protected First Amendment conduct could constitute concerted action on which tort liability could be based threatens to enervate the willingness—and ability—of voluntary associations to participate in the policy-making process. It is doubtful that the NAM would be able to receive and benefit from the advice and aid of our members in efforts to petition the government if they believed that in so doing they were engaging in conduct that could constitute tortious concert of action.

The NAM believes that such a chill on the exercise of a constitutionally protected right should not be sanctioned by this Court. Owing to our diverse membership, we believe that our filing a brief as *amicus curiae* will give a broader perspective to the legal and policy issues raised by the decision of the court below. In addition, the NAM believes that it is uniquely qualified to explain why the line of reasoning developed by the Michigan Court of Appeals, if left unchanged, will have consequences that

extend beyond the parties to this case and go to the very foundation of our system of government.

For these reasons, the NAM respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) files this brief in support of the Petitioner. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. The NAM represents approximately 13,000 companies, large and small, located in every state of the Union. Further, the NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National Industrial Council. The membership of the NAM represents an es-

timated 80 percent of all goods manufactured in the United States.

The NAM and its members are affected by the federal regulatory policy process involving virtually every government agency and department. As such, the NAM and its members are active participants in this process and frequently file comments or testify on proposed regulations and often urge an agency or department to take, or refrain from taking, some specific action. The NAM and its members view their participation in this process as an obligation of responsible citizenship and a right that is protected by the First Amendment to the Constitution. We believe that the decision of the Michigan Court of Appeals below has the effect of penalizing citizens for exercising their First Amendment right of petitioning the government. If left undisturbed, this decision could have the effect of penalizing citizens for the exercise of a protected right. Such a result is not only at odds with the clear intention of the Framers, but with tradition and the lofty goal of encouraging greater citizen input into the regulatory and political processes. Because of the vast and diverse involvement of the NAM and its members with a variety of federal regulatory bodies, this decision may have an adverse impact on their involvement in the regulatory process. For these reasons, the NAM submits the following arguments to the Court in support of the Petitioner.

SUMMARY OF THE CASE

On October 29, 1980, the Respondent filed this product liability, wrongful death action in the Circuit Court for Wayne County, Michigan. Following extensive discovery and oral argument, the defendants' motion for summary judgment was granted on the Respondent's first and second amended complaints, which had sought recovery on the basis of, *inter alia*, alternative liability and concert of action. Brief of Petitioner at 3-5.

On appeal, the Michigan Court of Appeals reversed the entry of summary judgment for the Petitioner and several other co-defendants insofar as the Respondent sought recovery on a concerted action theory. The only concerted action undertaken here was the Petitioner's participation, with other manufacturers, in a campaign to persuade the Occupational Safety and Health Administration (OSHA) to adopt an industry-wide safety standard governing the servicing of multi-piece wheel rims. This activity of petitioning the government, protected and guaranteed by the First Amendment, is thus, to the Michigan Court of Appeals, a potential basis for tort liability. The details of this decision are set forth in the brief of the Petitioner at pages 6 through 8.

The Petitioner's application for leave to appeal to the Michigan Supreme Court was denied and thus this petition for *certiorari* is from the decision of the Michigan Court of Appeals.

SUMMARY OF THE ARGUMENT

One of the most important and treasured rights guaranteed by the Constitution is the right to petition the government, found in the First Amendment. Accordingly, any attempt to abridge this right must be carefully scrutinized by this Court and can only be justified by a reasonable apprehension of danger to organized government. *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). The *Noerr-Pennington* doctrine operates in the context of antitrust law to shield businesses from liability for joint petitioning activity. *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The policies underlying this doctrine are equally applicable to non-antitrust situations and should prevent a finding of tort liability on a concert of action theory for the simple act of petitioning the government for the adoption of a safety standard.

A serious chill on the exercise of First Amendment rights could result if tort liability could be based on the simple act of joining together with others to petition the government for a particular action. Further, the efficacy and role of associations and other voluntary groups in the policymaking process would be seriously undermined under the rationale of the decision below, in direct contravention of the intentions of the Framers of the Constitution. As such, the petition for a writ of *certiorari* should be granted.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE PARTICIPATION OF THE PETITIONER IN A JOINT CAMPAIGN TO PETITION THE GOVERNMENT.

"Among the most precious of the liberties" enshrined in the Bill of Rights is the right to petition the government for redress of grievances. *United Mine Workers, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). The right to petition the government has been seen as being "a necessary adjunct to freedom of speech under the first amendment" and a guarantor of self government because "most important public questions are resolved by representatives in government, not plebiscites." Fischel, *Anti-trust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 100-101 (1977). As such, any attempt to limit or impose a penalty on the exercise of these rights must be closely examined and justified by a clear public interest. *Thomas v. Collins*, 323 U.S. 516 (1945).

Perhaps the best known applications of the First Amendment right to petition have occurred in the area of antitrust law. There, the *Noerr-Pennington* doctrine operates, by dictate of this Court, to shield businesses from antitrust liability for joint petitioning activity. *See*

Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). While this Court has never been asked to apply this doctrine to a case outside of the antitrust sphere, its rationale would appear to be equally persuasive here. Many lower federal and state courts have recognized that petitioning activity is the exercise of a First Amendment right and thus immune from tort liability. *See e.g., Havoco of America Ltd. v. Hollowbow*, 702 F.2d 643, 649 (7th Cir. 1983); *Missouri v. National Organization for Women, Inc.*, 467 F. Supp. 289, 305 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Sherrard v. Hull*, 53 Md. App. 553, 456 A.2d 59, 65-66, *aff'd*, 296 Md. 189, 460 A.2d 601 (1983). These courts have felt that the doctrine encourages the flow of opinion to decisionmakers and is important enough to extend to non-antitrust situations:

> The policies behind the *Noerr-Pennington* doctrine include preserving an individual's first amendment right to petition government officials and encouraging the free flow of ideas to political bodies in order to insure intelligent decisionmaking.

Ottensmeyer v. Chesapeake and Potomac Telephone Co., 756 F.2d 986, 996 (4th Cir. 1985).

In the case at bar, the efforts of the Petitioner were designed to insure that the government had the information needed to make an informed, intelligent decision on an issue concerning workplace safety. The Petitioner and others recognized the potential life-threatening danger of mishandling multi-piece wheel rims. Surely one could not expect that an adequate rule regarding their safe handling could be promulgated without the participation of the Petitioner and others similarly situated. Here, the Petitioner and others took the initiative in requesting that OSHA consider the promulgation of a

safety standard. The potential dangers of mishandling multi-piece wheel rims were recognized, rather than denied, and the Petitioner lent its good offices and expertise to an effort to develop a rim service safety standard. It is noteworthy that this standard, adopted by OSHA in 1980, has led to a 70 to 80 percent reduction in multi-piece wheel rim servicing injuries. *See* 49 Fed. Reg. 4341, App. G (1984).

Rather than being lauded for its efforts here, the Petitioner instead finds itself potentially subject to tort liability for its actions in jointly petitioning the government to address this issue. We suggest that this attempt to penalize the exercise of a protected First Amendment right is not "justified by clear public interest," and must, as a result, be struck down as unconstitutional. *Thomas v. Collins*, 323 U.S. at 530.

II. THE DECISION BELOW INFRINGES THE FIRST AMENDMENT RIGHTS OF THE PETITIONER.

Freedom of speech and the freedom to petition are often said to enjoy a preferred position in our jurisprudence. *Kovacs v. Cooper*, 336 U.S. 77 (1949). As such, the power to abridge these rights is the exception rather than the rule, and penalizing or preventing their exercise must be justified by a "reasonable apprehension of dangers to organized government." *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). There has been no suggestion of such a danger here. Despite this, the Michigan Court of Appeals has based its finding that the joint tortious activity required for a successful concerted action claim had occurred when the Petitioner engaged in protected First Amendment conduct. In short, because the Petitioner and its co-defendants had jointly petitioned OSHA for a safety standard, the Respondent could state a claim of joint tortious conduct.

We suggest that such a finding is in contravention of the *Noerr-Pennington* doctrine and violates the First Amendment. As noted earlier, this doctrine protects the Petitioner from liability for engaging in an activity protected by the First Amendment—and such an activity is the basis of the tort claim here in the opinion of the court below.

If left undisturbed, this decision will adversely affect the free flow of information to the government. Such a restraint on discussion and the flow of ideas must, in order to pass constitutional muster, be clearly related to a genuine public danger. *Thomas v. Collins*, 323 U.S. at 530. There has been no showing of any danger here that will justify this suppression of First Amendment rights.

III. THE DECISION BELOW WILL HAVE A SERIOUS IMPACT ON THE EFFICACY OF ASSOCIATIONS AND OTHER VOLUNTARY GROUPS.

Few can deny the value or impact of associations and other voluntary groups in modern life. From neighborhood groups formed to govern a residential subdivision to large trade associations, such groups play a valuable and continuing role in government and public affairs.

The role of associations and other voluntary groups in our system of government was foreseen by the Founding Fathers. Indeed, a goal of the national government to be created under the Constitution was to be the "regulation of these various and interfering interests . . . in the necessary and ordinary operations of the government." THE FEDERALIST No. 10 (J. Madison). Indeed, the authors of THE FEDERALIST wished to nurture those groups that practiced and fostered conciliation and compromise. A. BALITZER, A NATION OF ASSOCIATIONS, 27 (1981). To the Founding Fathers then, people will associate with others of their own interests, "seek to enlarge the influence of their members [and] command the public sphere . . . ." *Id.* at 29.

From these thoughts came the First Amendment rights of free speech and association, as well as that of petitioning the government for redress of grievances. The right of the public, either singularly or in groups, to seek to influence the workings of government is a hallmark of our system and has become embodied in statutes like the Administrative Procedure Act, *see* 5 U.S.C. § 551 *et seq.*, and in court decisions too numerous to enumerate.

Associations, like the NAM, live up to the role envisioned for them in THE FEDERALIST. The NAM, for example, is an active participant in the government process at the federal level. The NAM staff and/or representatives of its members testify before committees of Congress on proposed bills and submit written or oral statements to a multitude of regulatory bodies when informed opinion or advice is sought on proposed rules. The NAM often joins in coalitions with its members and other associations to press for a particular action from the Congress or a regulatory body. In so doing, the NAM believes that it is serving its diverse membership and the greater national good by adding to the free flow of information and ideas from which better national policy and law is supposed to result.

Under the principle of tort liability enunciated by the court below, it is possible to envision the enervation of this willingness to participate in the policymaking process. The NAM and its members are even now engaged in this process in the area of, for example, notification of the existence of hazardous substances in the workplace. It is doubtful that the association would have been able to secure the advice and active participation of our members in this effort if they believed that by urging the adoption of a particular standard they were, in effect, acting in a manner that could be found to be tortious "concert of action" conduct.

The removal of such interested parties from the debate and discussion of this and other issues would leave the policymaking process all the poorer and deprive the government of an excellent source of advice. The result clearly is the opposite of that envisioned by the the Framers of the Constitution.

The enhanced prospect of liability for engaging in protected First Amendment activities raised by the decision of the court below would probably lead to a reluctance on the part of many to exercise the rights therein granted. Such a chill on the exercise of a constitutionally protected right should not be countenanced by this Court. Further, if banding together to present views on a topical issue can, without more, lead to liability of the type suggested here, it is possible to foresee the gradual termination of association government and public affairs activity. The result again would be a lessening of the flow of information to government decisionmakers, as well as a diminution of the role of voluntary groups in public life.

Thus, in finding that protected First Amendment conduct could constitute concerted action on which tort liability could be based, the Michigan Court of Appeals not only exceeded constitutional bounds, but developed a line of reasoning that, if left unchanged, would threaten the role and vitality of the voluntary association segment of the private sector.

CONCLUSION

This Court should take this opportunity to examine the applicability of the *Noerr-Pennington* doctrine to a non-antitrust context. The freedoms enshrined in the Bill of Rights are endangered when liability can be imposed for the simple act of exercising one of them—here, petitioning the government. Indeed, the very foundation of our system of protected citizen input into the government process is in jeopardy when the act of petitioning the government can be found to be the basis of tort liability.

We therefore respectfully request that this Court grant the petition for a writ of *certiorari* to review the decision of the Michigan Court of Appeals below.

Respectfully submitted,

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